(27)

No. 05-130

FILED
JAN 26 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

EBAY INC. AND HALF.COM, INC.,

Petitioners,

v.

MERCEXCHANGE, L.L.C.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR AMICUS CURIAE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA — PATENT, TRADEMARK & COPYRIGHT SECTION IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. PITFALLS OF RELYING ON DRAFT LEGISLATION WHEN ASSESSING INJUNCTIVE RELIEF 4

A. Industry Disagreement on Working Requirements 4

B. No Definitive Governmental Position on Working Requirements 7

II. CALCULATING THE PROBATIVE WEIGHT OF POLITICALY-BASED EVIDENCE 11

A. Political Questions Are Nonjusticiable 11

B. Politically-Based Evidence and Equitable Relief 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Page

Baker v. Carr,
369 U.S. 186, 217 (1962) 12

Continental Paper Bag Co. v. Eastern Paper Bag Co.,
210 U.S. 405 (1908).....7

Marbury v. Madison,
1 Cranch 137, 177 (1803).....2

MercExchange L.L.C. v. eBay, Inc.,
275 F. Supp. 2d 695 (E.D.Va. 2003)..... ..2, 5

MercExchange L.L.C. v. eBay, Inc.,
401 F. 3d 1323, 1338-39 (Fed. Cir. 2005) 2

NTP, Inc. v. Research in Motion, Ltd.,
418 F.3d 1282 (Fed. Cir. 2005)..... 4

Ortho Pharm. Corp. v. Smith,
959 F.2d 936, 945 (Fed. Cir. 1992)..... 13

Rite Hite v. Kelley, Inc.,
56 F.3d 1538, 1547 (Fed.Cir.1995) 7

Vieth v. Jubelirer,
541 U.S. 267, 277 (2004)..... ...12

STATUTES

35 U.S.C. § 283 ..... passim

35 U.S.C. § 271(a) 6, 7

35 U.S.C. § 154(a)(1)-(2) 6, 7

TREATIES

Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization (Apr. 15, 1994) 10

MISCELLANEOUS

Brazil-Measures Affecting Patent Protection, Notification of Mutually Agreed Solution WT/DS/199/4, G/L/454, IP/D/Add.1 (July 19, 2001) 10

Brazil-Measures Affecting Patent Protection, Request for the Establishment of a Panel by the United States WT/DS/199/3 (January 9, 2001). 10

D. PRATER ET AL., EVIDENCE: THE OBJECTION METHOD 176 (1997) 13

Donald S. Chisum, Reforming Patent Law Reform, 4 J. MARSHALL REV. INTELL. PROP. L. 336, 340 (2005) 4

Federal Trade Comm'n, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy (2003) 6, 9

Gary Griswold, Remarks Before the Subcommittee on Courts, the Internet and Intellectual Property, United States House of Representatives, on H.R. 2795 (June 9, 2005).....8

House Committee Print of Patent Act of 2005 (Apr. 14, 2005) 8

Lamar Smith, Amendment in the Nature of a Substitute for H.R. 2795 (July 26, 2005) 9

Orrin Hatch, Remarks to the Generic Pharmaceutical Association (Sept. 20, 2005) 8-9

Patent Act of 2005, H.R. 2795, 109th Cong., 1st Sess., § 7 (June 8, 2005) 8

Ted Agres, Patent Changes Looming in United States, 19 THE SCIENTIST, 40 (2005)..... 5

Yuki Noguchi, Ruling Puts Blackberry Maker at Crossroads, WASH. POST, Dec. 1, 2005, at D1 5

BRIEF FOR AMICUS CURIAE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA — PATENT, TRADEMARK & COPYRIGHT SECTION IN SUPPORT OF NEITHER PARTY

THE INTEREST OF AMICUS CURIAE

The Patent, Trademark & Copyright Section of the Bar Association of the District of Columbia ("BADC") respectfully submits this brief as amicus curiae in support of neither party.[1]

The BADC is one of the senior-most intellectual property bar associations in the United States, drawing its membership from government, industry and private practice. The BADC and its members have a substantial interest in the adjudication of significant issues defining our intellectual property laws, and only submit amicus curiae briefs when issues of such magnitude arise. The case at bar presents such an important issue for our patent laws, namely defining the evidentiary criteria for determining availability of injunctive relief as a remedy for patent infringement. The BADC directs the Court's attention to political factors that may impact its reconsideration of precedent involving the grant of injunctions under 35 U.S.C. § 283.

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[1] This amicus curiae brief is presented by the Patent, Trademark & Copyright Section of the Bar Association of the District of Columbia under Supreme Court Rule 37.3(a). The parties have consented to the filing of this amicus curiae brief via blanket letters of consent on file with the Court. In accordance with Supreme Court Rule 37.6, no counsel for a party authored any part of this brief. Only this amicus curiae made a monetary contribution to the preparation and submission of this brief. Counsel prepared this brief on a pro bono basis.

SUMMARY OF THE ARGUMENT

In passing legislation codified at 35 U.S.C. § 283, Congress directed that injunctive relief is an equitable remedy that may be levied to prevent the violation of patent rights. The statute stipulates that such injunctions may be granted on terms deemed reasonable by courts having jurisdiction in patent disputes.[2] What Congress did not statutorily delineate is the criteria courts should consider in determining whether the grant of an injunction is an appropriate remedy for patent infringement. District court judges, as the gatekeepers and evaluators of probative evidence, are authorized to make such determinations.

The district court in this case noted a number of reasons upon which it based its decision to deny MercExchange's request for a permanent injunction. MercExchange, L.L.C. v. eBay, Inc., 275 F. Supp. 2d 695, 711-715 (E.D. Va 2003). The Federal Circuit found these reasons to be insufficient to decline entering a permanent injunction against eBay. MercExchange, L.L.C. v. eBay, Inc., 401 F.3d 1323, 1338-39 (Fed. Cir. 2005). Those reasons included legislation introduced in Congress regarding the validity of business-method patents. Id. at 1339; 275 F. Supp. 2d at 713-714. They also included MercExchange's lack of commercial activity in practicing the patents. Id.; 275 F. Supp. 2d at 712, 714. The issue of lack of commercial activity in practicing those patents, i.e., a working requirement, was involved in proposed legislation not specifically cited by the court. Thus, in essence, the

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[2] 35 U.S.C. § 283 recites: "The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable."

subject matter of two pieces of proposed or draft, but not enacted, legislation were taken into account in evaluating whether or not to invoke an equitable remedy against a patent infringer.

Because of its unsettled political nature, the BADC questions the extent to which the judiciary can rely on *proposed* or *draft* legislation when determining the availability of injunctive relief under our patent laws.[3] To illustrate the mischief this practice encourages, the BADC discusses herein our country's disparate views on linking patent enforcement with a working requirement. The BADC respectfully requests that, while reviewing its precedent on the grant of injunctions in patent cases, this Court clarify whether politically-based evidence, i.e., proposed or draft legislation, may be considered in the application of 35 U.S.C. § 283.

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[3] The BADC takes no position on whether a presumption exists for employing Section 283 as a remedy for patent infringement.

ARGUMENT

I. PITFALLS OF RELYING ON DRAFT LEGISLATION WHEN ASSESSING INJUNCTIVE RELIEF

Members of the patent bar, Congress, and the Executive Branch do not hold uniform views on policy factors supporting the grant of an injunction under 35 U.S.C. § 283. These views vary depending upon the nature of the invention being patented, essentially pitting the interests of the pharmaceutical and software fields against each other. This is precisely why the BADC could not support either party to this appeal; its membership is split on the issue.

A. Industry Disagreement on Working Requirements

As exemplified in the instant case, as well as recent litigation over the technology that enables Blackberry™ usage, the assertion of patent rights by patent holding companies has distorted the balancing act typically exercised between competitors in the software and electronics industries. NTP, Inc. v. Research in Motion, Ltd., 418 F.3d 1282 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 733 (2005) ("the Blackberry™ case"). These holding companies, sometimes refered to as "patent trolls," acquire the rights to United States letters patent, but do not seek to reduce the inventions to marketable products. Instead, they seek "a licensing fee settling actual or threatened patent litigation, litigation that could result in an injunction" and thus halt production of marketed products. Donald S. Chisum, Reforming Patent Law Reform, 4 J. MARSHALL REV. INTELL. PROP. L. 336, 340 (2005). Because they do not market their own competing products, "patent trolls" have no

incentive to end disputes by cross-licensing patents with the alleged infringer. Id.

Although both the defendants in the case at hand and the Blackberry™ case were sued by companies that meet Professor Chisum's definition of "patent trolls," the availability of an injunction differed between these cases. The district court adjudicating the Blackberry™ case is poised to enjoin defendant Research In Motion if the parties fail to reach a suitable settlement. See Yuki Noguchi, Ruling Puts Blackberry Maker at Crossroads, WASH. POST, Dec. 1, 2005, at D1. By contrast, the district court adjudicating the instant case did not grant a permanent injunction against eBay, in part because MercExchange does not produce products based on the patents the jury found eBay infringed. MercExchange L.L.C., 275 F. Supp. 2d 695, 712 (E.D.Va. 2003).

This discrepancy illustrates the growing uncertainty facing software and electronic companies marketing products that are often highly successful. Such companies contend that the grant of a permanent injunction should be linked to whether a patentee actually works his patent in order to level an increasingly distorted playing field.

The pharmaceutical and biotechnology industries generally oppose the proposition that a working requirement be linked to the availability of injunctive relief under 35 U.S.C. § 283. See Ted Agres, Patent Changes Looming in United States, 19 THE SCIENTIST 40 (2005). Although "patent trolls" may surface from under a pharmaceutical bridge, they have not gained the prominence seen in the computer and electronics industries. This is due in part to the differences in product lifespan, which is much longer for

pharmaceutical products than for software products. See Federal Trade Comm'n, To Promote Innovation: The Proper Balance of Competition and Patent law and Policy, ch. 3 at 1 -2, 45 (2003) ("FTC Report"), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>. In addition, the outlay for therapeutic product development is substantially greater than it is for software development. Id.

Generally, there are limited numbers overlapping patents for the same chemical or biologic entity, as opposed to the thousands of patents that may clutter the fields of software inventions. Robust intellectual property protection is key to attracting capital investment in the biotechnology sector, but may be less important to software companies. Id. at 1-2, 48-49. The pharmaceutical and biotech industries rely on the enforcement of patents to recoup the substantial resources required to develop pioneering products and to bring those products to the market.

Part of that enforcement strategy is to strictly prevent the making, using, offering to sell, selling or importation of a patented invention pursuant to the exclusive rights conferred under a patent grant. 35 U.S.C. §§ 271(a), 154(a)(1)-(2); see also FTC Report, supra, at 5-6, 18. The text of 35 U.S.C. § 283 provides injunctive relief in accordance with principles of equity to prevent the violation of those exclusive rights. Attaching a working requirement to the calculus for injunctive relief for patent infringement would impair the ability of pharmaceutical and biotechnology companies to maintain reasonable predictability of patent enforcement and, therefore, investor confidence. See FTC Report, supra, at 14, 16-18. Thus, protection strategies divide members of the patent bar along technological lines when it comes to weighing criteria for injunctive relief.

B. No Definitive Governmental Position on Working Requirements

The Supreme Court has considered the issue of the availability of injunctive relief for patentees who do not practice their patents. See Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405 (1908). In Continental Paper Bag, this Court noted that Congress qualified the grant of patents to aliens in 1832, requiring them "to introduce into public use in the United States the invention or improvement within one year from the issuing thereof," or risk revocation of their patents. Continental Paper Bag, 210 U.S. at 429. However, this law was repealed in 1836, and as of the holding in Continental Paper Bag, Congress has elected not to reinstate a policy curtailing the rights of patentees due to patent nonuse. Id.

Now, almost one hundred years later, certain groups advocate that the current economic climate in the software industry warrants a reevaluation of the balance between the rights of a patent holder under Sections 271(a) and 154(a)(1)-(2), and the public interest in having patents commercialized. The judicial preclusion of an injunction against a patent infringer has historically been confined to instances in which nonuse of a *particular* patent threatened the public interest. See, e.g., Rite-Hite Corp. v. Kelley, Inc., 56 F.3d 1538, 1547 (Fed. Cir. 1995). Congress, however, has not yet spoken to the issue of conditioning the rights of entire classes of patentees on the commercial practice of their inventions, much less placing such limitations on all owners of U.S. patents. While our legislators have been introduced to the subject, they simply have not reached consensus on how to address it.

Partly in response to the software industry's concerns over the demands of "patent trolls" in patent infringement litigation, Congress proposed draft legislation in 2005 aimed at revamping our patent laws. See Patent Act of 2005, H.R. 2795, 109th Cong., 1st Sess., § 7 (June 8, 2005) (hereinafter "2005 Patent Reform Bill"). Section 7 of the House Committee Print preceding introduction of the 2005 Patent Reform Bill included language directing that permanent injunctions would issue only if the extent to which a patentee makes use of an invention is considered. House Committee Print of Patent Act of 2005 (Apr. 14, 2005), at <http://judiciary.house.gov/media/pdfs/comprint 042005.pdf.>. Courts could not presume irreparable harm under this Committee Print. Id. Changes to Section 283 pertaining to stays of injunctions were also proposed. Id.

During hearings on the proposed legislation, some members of the patent bar voiced opposition to any amendments to our patent laws that would "undercut the exclusive rights conferred under a valid patent to obtain final injunctive relief following a non-appealable holding that the patent is valid and infringed." Written Statement of Gary Griswold before the Subcommittee on Courts, the Internet and Intellectual Property, United States House of Representatives, Washington, D.C., on H.R. 2795, Patent Act of 2005 (June 9, 2005), available at <http://www.aipla.org/Content/ContentGroups/Legislative_ Action/109th_Congress/Testimony5/HouseStmt_PatentAct2 005.pdf>. Clearly, not all members of the patent bar supported the proposed changes to Section 283. As observed by Senator Orrin Hatch, "[a]ltering the standard for determining whether injunctive relief should be granted in a patent infringement case has emerged as perhaps the most

contentious issue in the patent reform debate." Orrin Hatch, Remarks to the Generic Pharmaceutical Association, Sept. 20, 2005, available at <http://www.4ipt.com/IPMetalworks/SenatorOrrinHatchAddressesPharmaConcern.pdf>.

The working requirement was removed before H.R. 2795 was formally introduced. Eventually all amendments to Section 283 were omitted during the tenure of H.R. 2795. Nonetheless, the proposed legislation never advanced past the draft stage. See July 26, 2005, Amendment in the Nature of a Substitute offered by Lamar Smith, available at <http://www.promotetheprogress.com/ptpfiles/patentreform/Patentact2005_IPOcoalitionprint.pdf.> In short, Congress has yet to explicitly require courts to consider the extent to which patentees work their patents when weighing the equities for and against injunctive relief for infringement.

The Executive Branch has also commented on the subject of patent use and the availability of injunctive relief. In its 2003 report, the FTC acknowledged that because of the substantial overlap between innovative advancements, the computer industry is vulnerable to injunctive restrictions from "non-practicing entities," another term for "patent trolls." See FTC Report at 34-36, 39-41. Because numerous patents may cover a single component of a product, innovation in the software arena may be hindered by patenting, potentially harming the American economy. Id. at 52-54. "Hold up" patents, such as those owned by "patent trolls," are thought to drive up costs of computer hardware and software products which are passed along to consumers. Id. at 40-41, 56. However, the FTC did not specifically advocate an alteration in our laws to link patent enforcement to a patentee's practice of its patents.

On the international stage, the Executive Branch opposes any connection between a local working requirement and the enforcement of patent rights, arguing such requirements violate the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). See Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization (Apr. 15, 1994).

For example, the United States challenged Brazilian legislation in 2001 that authorized compulsory licenses and parallel importation of goods as a means of promoting the local working of patented inventions. See Brazil-Measures Affecting Patent Protection, Request for the Establishment of a Panel by the United States, WT/DS/199/3 (Jan. 9, 2001). The Brazilian legislation applied to patents of all kinds, although the primary driving force behind it was access to HIV/AIDS therapeutics. Id.

The United States Trade Representative argued that the text of the TRIPS agreement prohibits Members from requiring "local production of patented inventions as a condition for enjoying exclusive patent rights." Id. The United States later withdrew its claim without prejudice after entering into bilateral discussions with Brazil. Brazil-Measures Affecting Patent Protection, Notification of Mutually Agreed Solution WT/DS/199/4, G/L/454, IP/D/23/Add.1 (July 19, 2001). Although the local working requirement at issue in the Brazilian dispute is not identical to the working requirement contemplated in the Committee Print preceding H.R. 2795, the Executive Branch's opposition to working requirements under TRIPS is compatible with the position the pharmaceutical and

biotechnology industries have taken with respect to 35 U.S.C. § 283. What is evident is that the Executive Branch has at the very least acknowledged the tension between the exclusivity of patent rights and working requirements, but has not yet pronounced its policy on the issue in the domestic setting.

II. CALCULATING THE PROBATIVE WEIGHT OF POLITICALLY-BASED EVIDENCE

The above discussion exemplifies the unsettled issue of whether imposing a working requirement on U.S. patent owners would ensure fairness in the application of injunctions against patent infringers. None of the entities mentioned above – members of the patent bar, Congress, or the Executive Branch – have reached a definitive stance on how this political hot potato should be handled. Accordingly, there is political uncertainty as to when, if at all, it is appropriate to rely on proposed or draft legislation when considering injunctive relief for patent infringement.

A. Political Questions Are Nonjusticiable

A tenet of American jurisprudence recognizes that certain issues are not capable of resolution by our courts because they fall within the ambit of one of the political branches of government. As this Court explained in 2004:

> As Chief Justice Marshall proclaimed two centuries ago, '[i]t is emphatically the province and duty of the judicial department to say what the law is.' Marbury v. Madison, 1 Cranch 137, 177, 2 L. Ed. 60 (1803). Sometimes, however,

> the law is that the judicial department has no business entertaining the claim of unlawfulness-because the question is entrusted to one of the political branches or involves no judicially enforceable rights. . . . Such questions are said to be 'nonjusticiable' or 'political questions.'

Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (citations omitted).

Six independent tests may be employed to identify political questions, including, inter alia, a) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; b) the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government and c) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[4] Baker v. Carr, 369 U.S. 186, 217 (1962). These tests reflect the judicial guidelines established to follow the separation of powers set forth in our Constitution.

The case at hand does not require the Court to determine whether Congress intended *all* patentees to work their patents in order to receive equitable relief under 35 U.S.C. § 283. Nowhere in our patent laws does Congress articulate such a global requirement for patent enforcement. Because neither the Executive nor Legislative arms of our government have expressed a firm, definitive policy on

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[4] The other three Baker tests for nonjusticiability are: 1) a textually demonstrable constitutional commitment to the issue to a coordinate political department; 2) a lack of judicially discoverable and manageable standards for resolving it; and 3) an unusual need for unquestioning adherence to a political decision already made. Baker v. Carr, 369 U.S. 186, 217 (1962).

conditioning patent enforcement on a working requirement in the United States, attempts by the judiciary to settle this thorny question would stray into the political question thicket. Such actions would be contrary to the Baker tests noted above.

B. Politically-Based Evidence and Equitable Relief

Section 283 does direct our courts to apply principles of equity in apportioning equitable relief for patent infringement on terms the court deems "reasonable." See 35 U.S.C. § 283. When wearing their equity hats, district court judges have tremendous leeway in determining what relevant evidence to consider when making an equitable decision, and the weight to give that evidence. See Ortho Pharm. Corp. v. Smith, 959 F.2d 936, 945 (Fed. Cir. 1992) ("[Section 283] grants the district courts broad discretion in determining whether the facts of a case warrant an injunction and in determining the scope of the injunctive relief."); see also D. PRATER ET AL., EVIDENCE: THE OBJECTION METHOD 176 (1997) (noting "[a]ppellate courts recognize that the trial judge has a unique vantage point from which to detect and assess the negative factors that might arise from proffered evidence, and from which to balance these factors against the probative value of the evidence").

In the instant case, the district court considered essentially the subject matter of two pieces of proposed or draft legislation as evidence of public policy. It specifically cited one piece of draft legislation in its reasons to deny MercExchange's request for a permanent injunction against eBay. The Federal Circuit found the district court's rationale an inadequate basis for the denial of an injunction under Section 283. This issue is therefore before the Court.

In view of the Baker tests, the BADC questions the extent to which *proposed* or *draft* legislation should underpin any denial of relief under Section 283. Nascent legislation is not a consensus statement of Congress. It is no secret that legislation often morphs tremendously before being enacted, assuming it ever is enacted. Yet the district court in this case relied on draft legislation as evidence weighing against an injunction. When contemplating the use of proposed or draft legislation as evidence, does it matter which version the court relies upon? As explained above, as initially proposed, the 2005 Patent Reform Act required courts to consider whether a patentee worked his patent as a factor for granting a permanent injunction. As introduced, H.R. 2795 made no reference to a working requirement. A later version of the Bill omitted all language pertaining to Section 283. If a court, following the lead of this case, were to rely on one of the various iterations of H.R. 2795 in deciding a request for a permanent injunction, the version selected could be outcome determinative. The same principle applies to other Bills that are never enacted.

How firm must the proposed or draft legislation be to warrant consideration by a district judge? Should the judge be required to take into consideration any opposing positions on the matter espoused by the Executive Branch if not introduced into evidence by one of the parties to a dispute? Do courts circumvent the political question thicket by relying on "political question" evidence in rendering a decision based in equity? All of these questions come to mind when reading both the district court's and Federal Circuit's decisions in this case.

The BADC suggests that the practice of using proposed or draft legislation to mold equitable decisions generates a slippery slope, as equitable judicial decisions

based on relevant, but nascent political evidence may be de facto pronouncements of policy by courts. If a court were to base an equitable decision on proposed or draft legislation, such as the example used herein, the 2005 Patent Reform Act, would that court run the risk of facilitating "multifarious pronouncements?" Would that be particularly likely if the Executive Branch has taken a somewhat different tack when interpreting a treaty? The use of proposed or draft legislation to determine the applicability of 35 U.S.C. § 283 is an end around the teachings of Baker. The risk is not of deciding a political question per se, but rather in basing an equitable decision on a judicial interpretation of an undecided political question. If the Court finds no such risk, the Federal Circuit's evaluation of the evidence considered the district court in this case is drawn into question. Clarification is thus believed to be necessary and is respectfully requested.

CONCLUSION

Our patent laws provide for the imposition of an injunction based on principles of equity determined by the courts. The evidence to be weighed and balanced in this decision rests at the discretion of our district judges. However, the extent to which such decisions may be based on unsettled political evidence is unclear in view our legal precedent. In reconsidering it precedence on injunctive relief in patent cases, the Court is asked to provide an explanation as to whether proposed or draft legislation is permissible evidence in this context, or whether it trespasses into political question territory.

Respectfully submitted,

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January 26, 2006